FILED
MAR 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-992

In the Supreme Court of the United States

OCTOBER TERM, 1988

DALLAS COUNTY COMMISSION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals applied the proper standard of review in reversing the district court's judgment approving an election plan to remedy petitioners' violations of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973.

2. Whether the court of appeals properly required the district court to order elections under an election plan offered by the United States in a remedial hearing concerning the School Board, instead of remanding the case for further proceedings in the district court.

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OPINIONS BELOW

The opinion of the court of appeals concerning the Dallas County Commission (Pet. App. A15-A19) is reported at 850 F.2d 1430. The opinion of the court of appeals concerning the Dallas County Board of Education (Pet. App. A20-A47) is reported at 850 F.2d 1433. The district court's order adopting an election plan for the Commission (Pet. App. A1-A8) is reported at 661 F. Supp. 955. The district court's order adopting an election plan for the Board (Pet. App. A9-A14) is reported at 671 F. Supp. 1337.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1988. Petitions for rehearing were denied on September 9, 1988. Pet. App. A48-A51. The petition for a writ of certiorari was filed on December 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States filed this vote dilution case in October 1978. The complaint alleged that the at-large method of electing members of the Dallas County Commission and the Dallas County Board of Education impermissibly diluted black voting strength in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, and the Fourteenth and Fifteenth Amendments. Pet. App. A23.

1. Dallas County is located in south-central Alabama. Pet. App. A22. Selma is the county seat. According to the 1980 census, the county had a population of 53,981, approximately 55% of whom were black. *Ibid.* Blacks comprised 49% of the voting age population, however, and only 44.8% of the registered voters. *Ibid.*[1] Since 1901, the Dallas County Commission has consisted of four commissioners elected at-large from residency districts and the county probate judge, also elected at-large, who served as ex officio chairman and who had the power to vote in case of ties. The Dallas County Board of Education, at the time

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[1] The comparable figures for the 1970 census showed blacks to be 52.3% of the total population, 47% of the voting age population, and 43.3% of the registered voters. 548 F. Supp. at 886-887. The most recent voter registration statistics in the record (1984) show that 37,232 persons were registered, of whom 18,043 (48.46%) are black and 19,189 (51.54%) are white, PX. B-30.

of trial, had five members elected at-large from numbered posts for six-year staggered terms. Ala. Code, §§ 16-18-1, 16-8-2 (1975).

The history of voting discrimination in Alabama generally, and specifically in Dallas County, is well-documented in the reported decisions. See *United States* v. *Dallas County Comm'n.* 548 F. Supp. 875, 887-888 (S.D. Ala. 1982).[2] Despite numerous black candidacies since 1965, no black has been elected to the Commission or the School Board when opposed by a white candidate in an at-large election. Pet. App. A22.[3] Elections in Dallas County have been marked by a high degree of racial bloc voting.

2. In September 1982, the district court issued decisions finding in favor of the Board, 548 F. Supp. at 794, and the Commission, 548 F. Supp. at 875. The court made numerous findings weighing in favor of dilution.[4] It nonetheless concluded that the United States had failed to prove either that the at-large system of election was

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[2] See also, *e.g.*, *United States* v. *McLeod,* 385 F.2d 734 (5th Cir. 1967); *United States* v. *Atkins,* 323 F.2d 733 (5th Cir. 1963); *United States* v. *Clark,* 249 F. Supp. 720 (S.D. Ala. 1965); *United States* v. *Alabama,* 252 F. Supp. 95 (M.D. Ala. 1966); *Williams* v. *Wallace,* 240 F. Supp 100 (M.D. Ala. 1965); *Davis* v. *Schnell,* 81 F. Supp. 872 (S.D. Ala.), aff'd, 336 U.S. 933 (1949).

[3] In 1982, a black woman, Catherine Bozeman, was appointed to the Board of Education to fill an unexpired term. She ran unopposed in 1984.

[4] The district court found that (1) black candidates had been uniformly defeated, 548 F. Supp. at 902, 916; (2) voting in elections between black and white candidates had been marked by racial polarization, *id.* at 906, 916; (3) there had been a pervasive history of racial discrimination in voting, *id.* at 887-888, 916; (4) the socio-economic status of blacks was depressed, *id.* at 908, 916; (5) there is a majority vote requirement in party primaries, which are crucial to election in Dallas County, and (6) candidates must run for numbered posts, *id.* at 908.

created or maintained for a discriminatory purpose or that the system had a discriminatory result within the meaning of Section 2 of the Voting Rights Act, as amended in 1982.[5]

The court of appeals affirmed in part, vacated in part, reversed in part, and remanded for further proceedings. 739 F.2d 1529, 1541. The court of appeals concluded that the district court had committed clear error in finding that racial polarization was not a significant factor in the consistent defeat of black candidates. *Id.* at 1536. It also held that the district court erred in concluding that the requirement that candidates run for numbered posts did not weigh in favor of a finding of vote dilution. *Ibid.* The court of appeals concluded that the district court's errors on these two significant factors required reversal. *Id.* at 1537. It also ordered the district court to reconsider on remand the low socio-economic status of blacks and other possible lingering effects of past discrimination in determining whether the at-large system resulted in a dilution of the black vote. *Id.* at 1537, 1541.

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[5] The case was originally tried in November 1979 under the standard articulated by the Fifth Circuit in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (1973) (en banc), aff'd on other grounds *sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976). See *United States* v. *Dallas County Comm'n*, 739 F.2d 1529, 1532 (11th Cir. 1984)). Following the decision in *Mobile* v. *Bolden*, 446 U.S. 55 (1980), in which a majority of this Court disapproved exclusive reliance on the *Zimmer* factors as proof of unlawful dilution, the United States sought to present evidence that the at-large scheme of election was adopted with discriminatory intent. By the time the district court issued its decision, however, Congress had amended Section 2 to make clear that proof of discriminatory intent is not required to establish a violation of Section 2, S. Rep. No. 417, 97th Cong., 2d Sess. 2 (1982), and the district court applied that standard in reaching its decisions.

On remand, the district court, over the objection of the United States, granted the School Board's motion for "severance" from the Commission portion of the case. Pet. App. A64-A65. The court then granted the Board's motion for judgment on the pleadings, concluding that the court of appeals' decision had "left undisturbed" the district court's prior judgment in favor of the Board. *United States* v. *Dallas County Comm'n,* C.A. No. 78-578-H (S.D. Ala. Feb. 11, 1987), slip op. 2. The court of appeals summarily reversed that judgment with express direction that the district court grant the United States' motion for a preliminary injunction against the upcoming School Board elections. 791 F.2d 831, 833.

3. During the pendency of that appeal, the district court held a hearing on the remanded issues concerning the Commission. In March 1986, it enjoined the upcoming primaries for Commission elections and ordered the Commission to prepare a fair election plan. In June 1986, it issued an opinion finding that the at-large system of electing county commissioners violated Section 2. 636 F. Supp. 704.[6] After the Attorney General interposed an objection,

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[6] The court found that the evidence presented on remand concerning racial bloc voting in elections since 1982 showed no substantial change in voting patterns in Dallas County and thus would not "change the opinion expressed by" the court of appeals, *i.e.,* that the district court committed clear error in finding that racial polarization in voting was not a significant factor in the failure of blacks to win elections. 636 F. Supp. at 708, 710. It "incorporate[d]" the court of appeals' mandate that the combination of a majority requirement in the primary, the significance of the Democratic primary, and the use of numbered posts "operates to cancel voting strength of minorities in Dallas county." *Id.* at 709. Finally, it found that the factor of "past discrimination and its lingering effect" became "superfluous" in light of the great weight attributed to polarized voting and the structure of the election system by the court of appeals. *Ibid.*

pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, to the plan prepared by the Commission, Pet. App. A26 n.3, the district court drew its own plan. The district court's plan consisted of two districts in which white voters held an electoral majority and two districts in which black voters were in the majority and also retained the probate judge as ex officio chairman of the Commission elected at-large from the county. Without holding an evidentiary hearing, and over the objection of the United States, the court ordered its plan into effect for the November 1988 elections. Pet. App. A1-A8.

Following remand from the court of appeals in the Board portion of the case, the district court entered an order adopting as to the Board the same findings and conclusions as it had made for the Commission and ordered the Board to draw a fair election plan, *United States* v. *Dallas County Comm'n,* C.A. No. 78-578-H (S.D. Ala. Feb. 11, 1987). The Board drew, and submitted for Section 5 preclearance, a plan containing five single-member districts. After the Attorney General objected to the configuration of the districts, Pet. App. A27-A28, the district court entered an order proposing to adopt for the Board substantially the same plan that it had ordered for the Commission. *Id.* at A57-A60.[7] After an evidentiary hearing and again over the objections of the United States, the court ordered that plan into effect for the November 1988 Board elections. *Id.* at A9-A14.

4. Appeals by the United States from both remedial orders were consolidated for purposes of oral argument, and on July 13, 1988, the court of appeals reversed,

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[7] The only difference between the two plans was that the member elected at-large on the Board would not act as its chairman. Pet. App. A13-A14.

holding that the election plans adopted by the district court were insufficient to remedy the Section 2 violation. Pet. App. A25-A47. Because of the length of time that had passed since the last elections for Commission and Board of Education were held in Dallas County, the court of appeals determined that the delay that would be occasioned by a remand for a further hearing was unwarranted. *Id.* at A37-A38. The court of appeals found that the district court had committed clear error in two respects in rejecting a remedial plan drawn by the United States' expert, Dr. Allan Lichtman, as an alternative to the court-drawn plan. *Id.* at A36-A37. It therefore ordered the district court to schedule elections for both bodies under the Lichtman plan. *Id.* at A18, A38. The court of appeals subsequently denied petitions for rehearing filed by both petitioners. *Id.* at A48-A51.[8]

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[8] The mandate issued on September 19, 1988. It called for elections to be held under the Lichtman plan pursuant to a schedule (to be established by the district court) that would allow the general election to be held in November. Pet. App. A18, A40-A41. Shortly thereafter, the United States filed in the district court a proposed election schedule that would have allowed elections to be held in accordance with that mandate. Rather than issue an election schedule, however, on September 30, 1988, the district court itself filed a motion for clarification of the mandate. *Id.* at A66-A71. In that motion, the court stated that it had studied the Lichtman plan only for the purpose of comparing that plan to the court's own plan but had not determined its legality under Section 2 or the Fourteenth Amendment. Pet. App. A69. The court also stated that it was unsure of the district boundaries drawn by the plan. Pet. App. A69-A70. Finally, the court contended that insufficient time remained for scheduling primary and run-off elections in order to allow for a general election in November 1988. *Id.* at A70. The court therefore requested "clarification and guidance" from the court of appeals. *Id.* at A71.

The court of appeals denied the district court's motion on October 6. Pet. App. A61-A63. It provided, however, that because it was then

ARGUMENT

Petitioners press two main contentions. They assert that the court of appeals improperly applied the clearly erroneous standard of Fed. R. Civ. P. 52(a) in concluding that the election plan adopted by the district court was inadequate to cure petitioners' violation of Section 2. In addition, they contend that the court of appeals erred in ordering the district court to adopt an alternative plan, rather than remanding the case for further hearings. Neither contention is correct. The court of appeals properly applied established precedent from this Court in reaching its decision, and petitioners point to no conflict among the circuits concerning the issues on which they seek review. Moreover, both issues are necessarily tied to the circumstances of this litigation, and neither presents an important federal question requiring resolution by this Court. Accordingly, review by this Court is not warranted.

1. The issue before the court of appeals was whether the election plan drawn and adopted by the district court was an adequate remedy for petitioners' Section 2 violations. The district court had already found that the at-large election schemes employed by petitioners resulted in an unlawful dilution of the voting strength of minority

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"virtually impossible" to schedule elections so as to hold the general election in November, the general election should be held not later than December 31, 1988. *Id.* at A63. That election was held on December 27, 1988. New commissioners and board members were recently sworn in at Selma.

On January 31, 1989, the five new commissioners filed a pro se motion to dismiss the petition in this case. The school board did not join in that motion. If the motion is granted, the Commission will no longer be a party to this case. In that event, however, the case will be even less deserving of review.

voters under Section 2,[9] and the district court made no additional relevant factual determinations in adopting the remedial plans.[10] Given the factual determinations that the district court had already made in that regard, the United States contended on appeal that the court had abused its discretion in retaining an at-large seat on the Commission and the School Board. Based upon the same findings made by the district court in connection with the liability stage of the case, the court of appeals concluded that retention of one at-large seat in the remedial plan would continue the past denial of the rights of black voters. Thus, the court of appeals was not required to find any factual determination made by the district court to be

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[9] The facts supporting the violation are as follows: (1) elections in Dallas County continue to be marked by an extreme degree of racial bloc voting; (2) despite numerous black candidacies since 1965, no black candidate has been elected in an at-large contest against a white candidate during that period, or, indeed, since Reconstruction; (3) blacks, who in 1980 constituted 55% of the total county population, 49.8% of the voting age population, and 44.8% of the registered voters, "share a vastly lower socio-economic status than do whites in Dallas County" and have been the victims of "pervasive racial discrimination that has left [them] economically, socially, culturally, and politically disadvantaged," Pet. App. A4, A33-A34; and (4) the use of numbered posts and a majority vote requirement in the crucial primary elections has contributed to the dilution of minority voting strength. *Ibid.* Given the racial composition of the county's electorate and severe racial bloc voting, the at-large scheme of election denied black voters an equal opportunity to elect candidates of their choice.

[10] Indeed, the district court did not even hold an evidentiary hearing before adopting the remedial plan for the Commission. While the United States noted on appeal that the failure to hold such a hearing was contrary to the law of the circuit, *Edge* v. *Sumter County School Dist.*, 775 F.2d 1509 (11th Cir. 1985), we argued that the record as developed on remand, which led the district court to find a violation, was itself sufficient to demonstrate that the remedial plan adopted by that court was inadequate. No. 87-7459 Gov't C.A. Br. 19.

clearly erroneous in order to conclude that the plans it had adopted did not provide an adequate remedy for the Section 2 violations.

Petitioners point to no specific factual finding made by the district court that was disregarded by the court of appeals. Although petitioners categorize (Pet. 13) as an "ultimate factual finding" the district court's statement that its remedial plan was "fair" (Pet. 13), that "finding of fact * * * is inseparable from the principles through which it was deduced," *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485, 501 n.17 (1984). The fairness of an election plan in a vote dilution case is determined by whether it meets the statutory standard established by Section 2.

Here, the district court had found that its election plans for the Commission and the Board were "fair," because it found that the at-large seat in its plan was the equivalent of a fifth "swing" district. By definition, however, a swing district should be one in which black voters have a fair chance of electing candidates of their choice.[11] But the

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[11] There is considerable discussion by the court of appeals of the district court's finding that the at-large seat in the court-approved plan is the equivalent of a fifth "swing" district, because it reflects the county-wide population. Pet. App. A31-A34. The court of appeals did "disagree" with that finding, but the disagreement is not a factual one, *id.* at A33. Rather, the court of appeals concluded that the district court's analysis failed to take into account the lower voting age population of blacks and the fact that past racial discrimination and the vastly lower socio-economic status of blacks result in an even lower population of black registered voters and low black turnout at the polls. *Id.* at A33-A34. In addition, the United States argued below that blacks would be especially disadvantaged if the plan included an at-large seat rather than a single-member district with a comparable racial composition because blacks disproportionately lacked the financial resources to run a county-wide campaign and, because of racial attitudes that are the legacy of past racial discrimination, were

district court had already found that black voters had no such chance in an at-large election in Dallas County. Accordingly, the court of appeals properly concluded that, for the same reasons that the at-large election system unlawfully diluted black voting strength, the election plans adopted by the district court, which retained an at-large feature, did not as a whole provide the black voters of Dallas County with an equal opportunity to participate in the electoral process and elect candidates of their choice. Using the facts found by the district court, the court of appeals concluded, as a matter of law, that the district court's plans "perpetuate[] rather than ameliorate[] the inequities which have resulted in an abridgement of Dallas County's black citizens' access to the political process." Pet. App. A34.[12]

2. Petitioners also contend (Pet. 16-23) that the court of appeals erred in requiring the district court to order elections under the Lichtman plan, one of two plans offered in evidence during the Board remedial hearing, rather than remanding to the district court for further hearings. Although we did not ask the court of appeals itself to order a particular plan to be implemented, we submit that the court of appeals' action was within its authority in the peculiar circumstances of this litigation.

As the court of appeals noted, although ten years had passed since this lawsuit was commenced, black citizens of

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not able to campaign effectively in predominantly white areas of the county.

[12] Contrary to the district court's characterization, Pet. App. A11 n.3, the United States did not take the position that the "finding of a Section 2 violation, in and of itself, mandates the removal of all existing at-large seats." Rather, we argued that, under the facts in this record, the retention of an at-large seat failed to remedy the Section 2 violation.

Dallas County continued to be denied an "opportunity to effectively participate in the election process," and all citizens had been denied the "right to govern their affairs" and to participate in elections that fairly reflect their voting strength in the county. Pet. App. A38.[13] Both petitioners had been given an opportunity to propose plans to remedy their Section 2 violations, and the Attorney General objected to both plans submitted for preclearance under Section 5 of the Voting Rights Act of 1965. Pet. 2-3; Pet. App. A27-A28, A37.[14] The court of appeals properly relied in part on these "preclearance defaults," Pet. App. A38, in addition to the protracted history of this litigation, in determining that it should order into effect a plan that "completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice," S. Rep. No. 417, 97th Cong., 2d Sess. 31 (1982). See *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965) ("the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future"). Faced with that situation and the need for prompt elections, the court of appeals acted properly in directing the adoption of an available plan that it concluded "vindicates the rights of Dallas County's black citizens whose opportunity to effectively

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[13] The last elections for the Commission were held in 1984, and Board members were last elected in 1982. The 1986 elections for both bodies had been enjoined pending the outcome of the litigation, and the court of appeals had stayed primary elections scheduled for June 1988. Pet. App. A37.

[14] Since the Board had submitted and obtained preclearance of a change from at-large elections to single-member districts, the Lichtman plan was closer to the Board's then-expressed preference than the 4-1 plan ordered by the district court.

participate in the election process has been denied." Pet. App. A38.

Regardless of whether any party below actually advocated adoption of the Lichtman plan in preference to the district court's plan (Pet. 17-19), it was clear that the district court gave serious consideration to that plan on its merits and, for reasons that the court of appeals determined were clearly erroneous, concluded that it was inferior to the district court's own plan. Pet. App. A23. No further hearing in the district court could have added any material facts to the record already before that court. Nor do petitioners contest (see Pet. 17) the fact that the court of appeals properly applied Rule 52(a) in overturning, as clearly erroneous, the district court's reasons for rejection of the Lichtman plan.[15]

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[15] Petitioners argue that no evidentiary hearing on the remedial plan was held in the Commission portion of the case, and thus that the Lichtman plan was not in issue at the time the district court adopted the Commission plan. That claim lacks merit. The Commission did have its day in court on the underlying question whether the fifth seat in the remedial plan should be a single-member district or an at-large seat. Although both petitioners complain that the district court was not given an opportunity to determine whether the Lichtman plan complies with Section 2, neither has suggested how that plan fails to comply with Section 2. Thus, nothing would have been gained by a remand for further hearing.

Petitioners contend (Pet. 20-23) that the court of appeals' failure to retain a role for the county probate judge on the Commission conflicts with this Court's decision in *Upham* v. *Seamon*, 456 U.S. 37 (1982). That argument lacks merit.

In *Upham*, this Court held that a court, in fashioning an apportionment plan, should not "intrude upon state policy any more than necessary" to cure the violation. 456 U.S. at 42, quoting *White* v. *Weiser*, 412 U.S. 783, 794-795 (1973). The district court in *Upham* erred in altering portions of the state's plan that had not been found to violate

Thus, under the circumstances of this case, where the voting rights of black citizens has gone unremedied for a substantial period of time and where all county citizens had been denied an opportunity to elect commissioners and school board members since 1986, we submit that the court of appeals did not exceed its authority in ordering prompt elections under a plan that the district court had had an opportunity to review and had rejected for reasons later found by the court of appeals to be based on clear error.[16]

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federal statutory or constitutional principles. Here, in contrast, the district court did find a violation of Section 2 in the use of an at-large electoral scheme. Moreover, the probate judge has countywide judicial functions in addition to his legislative role on the Commission, and is therefore elected at-large. See *Butts* v. *City of New York*, 779 F.2d 141, 148 (2d Cir. 1985), cert. denied, 478 U.S. 1021 (1986). Accordingly, since the court held that the retention of an at-large seat would not remedy the Section 2 violation, the probate judge could not retain his position as a legislator on the Commission. The district court had also already rejected the option proposed by petitioners here, and by the United States below, of having the probate judge remain on the Commission in a non-voting capacity, while adding a fifth single-member district. See Pet. App. A4 n.2, A7. Accordingly, nothing would have been gained by remanding to the district court for consideration of ways to preserve a role for the probate judge on the Commission, as petitioners suggest. Pet. 22. Finally, any claim of an established "state policy" is tenuous in light of the fact that the probate judge is a member of the county commission in only 33 of the 67 Alabama counties. 661 F. Supp. at 957.

Finally, as the district court itself acknowledged (Pet. App. A59), there was even less justification for retention of an at-large member on the School Board, since the Board itself had proposed a remedial plan consisting of five single-member districts, and no special duties for the at-large member were contemplated under the court's plan.

[16] Petitioners' claim (Pet. 23-28) that the Lichtman plan violates one-person, one vote principles under the Equal Protection Clause does not warrant this Court's review. The deviations among the five districts in the plan fall within the 10% de minimis rule established for

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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MARCH 1989

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state legislative plans. *Connor* v. *Finch,* 431 U.S. 407, 418 (1977). Moreover, "slightly greater percentage deviations may be tolerable for local legislative districts," because such districts have smaller populations than congressional or state legislative districts and local legislative bodies have far fewer members. *Abate* v. *Mundt,* 403 U.S. 182, 185 (1971). While a court-ordered plan must be held to a higher standard than one proposed by a state or local legislature, *Chapman* v. *Meier,* 420 U.S. 1, 26-27 (1975), petitioners err in claiming that the plan ordered into effect by the court of appeals is unconstitutional, since a 10% deviation is valid under *Connor* v. *Finch, supra.* In addition, the court of appeals in this case was faced with the need to hold prompt elections; elections had been enjoined, incumbents were holding office under a plan found to violate Section 2 of the Voting Rights Act, and the Board had failed to submit a plan that complied with Section 2. Because the record contained a plan that met Section 2 standards and that did not exceed the deviations allowable in a legislatively-drafted plan, the court of appeals did not abuse its discretion in ordering that elections be held under that plan. Finally, the school board must be reapportioned after the 1990 census. Because school board members are elected for six-year staggered terms, it is quite possible that there will be no further elections under this plan. Thus, the court of appeals' ruling presents no question of continuing importance, especially in light of the fact that this argument was raised for the first time in a petition for rehearing and therefore was not addressed by the court of appeals.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00160